IN THE MATTER OF THE LAWLESSNESS OF THE POLICE—A REPLY TO MR. JUSTICE GAYNOR.

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By far the most insidious form of a lie is a half truth told with a false emphasis. Such a lie has all the dangerous charm of a misapplied table of statistics. The public accepts the statistics, and has neither the leisure nor the means to find out wherein they have been misapplied. It is precisely this kind of a lie that Justice Gaynor—unwittingly, of course—has told in his paper published in the Review for January.

Though that paper is entitled "Lawlessness of the Police in New York," he has confined himself to a discussion of the over-zealousness of the police and of others in making arrests, and has not even touched on those serious forms of lawlessness the existence of which all who know anything of the police admit, and the persistence of which may well be regarded as a real source of danger to our institutions.

For the purpose of this discussion, Judge Gaynor's paper may be divided into three parts. First, his discussion of the technical rules of law governing the right to arrest, coupled with the assertion that the police frequently overstep the bounds set by these rules—this constitutes the half truth. Second, the assertion that this abuse of authority is the cause and mainstay of corruption in the police department, and the insistence that these illegal arrests are of a character that constitutes them a serious menace to our institutions. This is the half that is untrue, and, coupled with the title prefixed to the paper, gives the false emphasis which makes the whole in essence untrue. Third, a recital of a specific instance of such abuse of authority, coupled with the expression

of the author's sense of outrage that the flagrant abuse in that specific instance had not resulted in a popular uprising and in the disgrace of the official in question; in regard to which the learned author has been grossly misinformed, and has been led into an attitude of serious error and grave injustice.

I.—THE HALF TRUTH.

As to the law governing the right to arrest, what Judge Gaynor has said, of course, constitutes the truth, as any one may find for himself by consulting our Penal Code and Code of Criminal Procedure, or any elementary work on criminal procedure.

It is also true, in all probability, that arrests are frequently made and that houses are sometimes broken into by the police in excess of authority. A policeman on post is informed that Mulligan has come home drunk, and that there is a likelihood that he will reduce Mrs. Mulligan and the children to mince-meat. The officer happens to know that it is Mulligan's custom thus to divert himself in his cups; that Mulligan's last exhibition of playfulness cost Mrs. Mulligan a month in the hospital and Mulligan six months on the island. The policeman, knowing these trifling details, climbs to the top floor of the tenement, and, finding the door of the Mulligan apartment locked, breaks in, just as Mulligan is about to carry out the promise which for the past half hour he has been making, volubly but incoherently, to kick Mrs. Mulligan into a jelly. The policeman has committed an act of unpardonable lawlessness. He has broken into the castle of a freeman, and has prevented the freeman from manhandling his wife, and from spending six months in jail in consequence thereof. Had he been a faithful servant of the people, and had he observed his sworn duty of upholding the Constitution, he would have waited outside until the freeman had consummated his design, and until he was quite sure that the assault which was being committed was felonious—and not till then would he have invaded the freeman's castle. We have no doubt that it will amaze the unthinking millions of the County of New York to learn that such outrages are committed in the name of the law daily, and that, in spite of these outrages, the respect for the Constitution persists and the ship of state sails serenely on with its rottenness unsuspected even by the rats.

It may be true also, though we believe that it is rarely true,

that, in addition to such outrages as we have described, organized "raids" are sometimes made on houses of prostitution which are being conducted in such fashion as to constitute a public nuisance, and that in such cases arrests have been made promiscuously and without warrants. But we believe that such promiscuous arrests have been infrequent; that the raids have almost always been made under the authority of a warrant of arrest for the alleged proprietor of the place, that the places in which they have been made have uniformly been notorious and unsavory public resorts, and that such arrests as have been made therein without warrants have been made on the theory that all those thus arrested were assisting in committing a public nuisance and were guilty of conduct which outraged public decency.*

We have ventured to insist upon the rarity of arrests of this character in the face of the learned Judge's insistence upon their frequency, because—since from the nature of things there can be no trustworthy statistics on the subject—our own estimate is as authoritative as that of the learned Judge, and because the character of the learned Judge's information with regard to some of the matters as to which he has chosen to be specific, tested by such data as we have at hand, does not impress us with a belief in his infallibility. We are confident, therefore, that a careful investigation of the subject will reveal that abuses of power on the part of the police, in the matter of unlawful arrests, are neither so frequent nor so flagrant as to warrant any serious concern that they are undermining our institutions.

II.—THE ERRONEOUS DEDUCTION.

The learned Judge is of the opinion, however, that these unlawful arrests are threatening our institutions in another direction; that they are the source and mainstay of corruption and blackmail in the police force. If he were right in this conclusion, there could be no doubt that his paper, however ill-considered and unfair in other directions, would still be justified by the importance of the evil that he was pointing out. Plainly, however, he is too far removed from the tangle and muck of the underworld to know the workings of its underground machinery, or he could never have fallen into such an error. Those who are blackmailed pay the police, not for freedom from illegal interference, but for pro-

* See sections 385, 387, 675 of the Penal Code.

tection from legal interference; and, the moment the payment of blackmail ceases, the proprietor of the illegal resort finds his resort suppressed, not by an illegal raid, but by a legal prosecution. This is one of the A. B. C.'s to those who know aught of the police and their methods.

III.—THE FALSE EMPHASIS.

This brings us to the real point of our dissent from the learned Judge's paper. Had his paper been entitled "The Right to Arrest" and had the paper been free from misstatement of modern instances, we should have regarded it as an interesting, popular discussion of elementary principles of law, as little harmful as novel; and though it had contained, as it does contain, what we would have believed, as we do believe, to be gross exaggeration—unwitting, of course—we should have thought that even the eminence of the author would not have required or justified a reply from even so humble a pen as the present writer's. It is the false emphasis conveyed by the title and the reference to specific instances, that make it seem important to refute the article.

And, first, as to the falseness of the emphasis conveyed in the title. By entitling his article "The Lawlessness of the Police," the learned author impliedly asserted that what he would discuss would be the chief element of their lawlessness; that part of their conduct which it behooved the good citizen to scrutinize in order that he might safeguard his own interests. By discussing under that head the occasional illegal arrest, he has lulled the good citizen into security by distracting attention from the true lawlessness of the police,—their systematized corruption and blackmail, their alliance with the keepers of brothels and of gambling houses, their partnership with criminals and their acceptance of the proceeds of thefts and burglaries, their stolid and compact organization for perjury as an offensive and defensive measure. Also, he has actually afforded a new line of defence to the blackmailer.

Heretofore, the great instrument in the hands of those who have undertaken to weed out the corrupt among the police, and thus to institute reform, has been the prosecution, civil and criminal, for neglect of duty. It is rarely possible to prove blackmail, and experience shows that the witnesses by whom it is proved are even more rarely credited by juries. But reputable witnesses can be

adduced to show that duties have been neglected; and convictions can sometimes be had before intelligent juries, and always, when the evidence justifies it, before an honorable police commissioner. Manifestly, the corrupt among the police are always eager for defences to this form of prosecution; and, manifestly, they hail with joy any judicial utterance which emphasizes the difficulties of successful prosecution. Manifestly, too, anything which imposes limitations upon their lawful activities in the suppression of crime tends to increase the plausibility of the excuse always tendered for a failure to suppress an illegal resort, namely, that it has been impossible to do so. Therefore, so much of Judge Gaynor's article as emphasizes the unlawfulness of entry into a house until after a demand for admission has been made and warrant of authority has been shown with great formality and circumstance, will be a boon to any officer who is called upon to explain his failure to carry to a successful issue an attempt to make an arrest of the proprietor of a gambling house or of a house of prostitution. For he has only to say: "I did all the law permitted. But, while I was doing those things Judge Gaynor has said I must do, the criminals escaped over the roof or into the next house or through the yard."

Moreover, the natural result of Judge Gaynor's article will be to inspire the honest policeman with timidity in the performance of his duty. Certainly, no officer desires to call down upon his head such condemnation as the learned Justice has meted out to Inspector Brooks for his raid upon Canfield's; and, certainly, no officer, however zealous, will fail to underestimate, rather than to overestimate, his authority in such a case, when he realizes that by failing to make an arrest he may be called to account solely for mistake of judgment, whereas by making the arrest in excess of his authority he runs the risk of a criminal prosecution.

Had the learned author been in the position of private counsel, retained to prepare a brief for criminals upon their right to avoid and resist arrest, he could have done no greater service to the criminal classes.

IV.—THE PART WHICH IS NOT EVEN HALF TRUE.

Hitherto, we have been discussing the false impressions that result from the half truth and the false emphasis. The article contains, however, that which is entirely false in a cruder sense,

namely, a complete, though, of course, unintentional, misstatement of facts.

In support of his thesis, the learned author has deemed it proper to cite two modern instances; and, though he has omitted names and dates, he has cited them in such detail as to make mistake as to the identity of the persons and places referred to impossible. The first of these is the recent raid on Canfield's gambling house. The second is the shooting of an alleged felon, by a county detective attached to the District Attorney's office, in a raid earlier in the year. It will be conceded by all, we take it, that it is incumbent upon a judicial officer, if in a public utterance he adverts to matters pending in the courts, that he shall confine himself to undisputed facts gathered from sure and impartial sources. With regard to the Canfield incident, the learned author certifies that he has done so and thus adds to the weight which his judicial position gives to the utterance the additional force which comes from the presumption of an impartial investigation by a trained mind. He says:

> **"All accounts agree as to the particulars of it. And the writer of this article verified them by obtaining a statement from a truthful and careful person who was present throughout."**

According to a subsequent statement made by the learned Judge, in his letter to Mr. Jerome, the District Attorney, the "truthful and careful person who was present throughout" was Mr. Canfield's private attorney, than whom no other could have a greater motive to give a biased and colored narrative; and, upon the basis of his *ex parte* statement, the learned Judge has published, over his own signature, a story of the occurrence as to which it is not only not true that "all accounts agree," but which is in direct conflict, in all essential particulars, with the sworn testimony of a number of trustworthy witnesses.

The truth about that raid is as follows: For years it has been well known that No. 5 East 44th Street was being conducted as a gambling house by one Richard A. Canfield; but, since the patrons of that house were of the wealthier class, it was believed that a paid detective or a police officer would find it impossible to get evidence to justify an arrest of the proprietor of the house or of any of his accomplices. Finally, such evidence was obtained and a warrant was issued by a magistrate. This warrant was intrusted to In-

spector Brooks to execute. He was fortified, not only by a warrant for one of the dealers in the house who was charged with the commission of a felony, but also with a search warrant which would justify him in breaking open interior doors and cabinets for the purpose of discovering gambling paraphernalia. Armed with this authority and acting under the instruction of his superior officer, the Commissioner of Police, he went with a squad of men to the neighborhood of No. 5 East 44th Street. He posted his men so as to bar, as far as possible, all avenues of escape. He then tried the outer door of the premises, a heavy, nail-studded, double door. Finding no bell, he knocked and pushed at the door. Receiving no response, he went into the area-way, and rattled an iron gate leading into what are ordinarily the servants' quarters of a house, with such vigor that the noise could be heard two or three doors away. He also pushed an electric button. Again he received no response. Then, finally, he attacked the outer door with a small sledge and gave his officers instructions to seek an entry by the window. These facts have been sworn to in a judicial proceeding by the Inspector and by a number of policemen who were present under his command. We would seem, therefore, to be justified in saying that these are the facts.

Judge Gaynor's account of these occurrences is as follows:

"Several typical instances of the lawless invasion of houses by the police in the City of New York occurred only last month. It will suffice to describe one of them. All accounts agree as to the particulars of it, and the writer of this article verified them by obtaining a statement from a truthful and careful person who was present throughout. The house invaded was said to be a place of private gaming. A large posse of policemen suddenly surrounded it and violently attacked it. They smashed in a window by means of some heavy weapon, and entered pell-mell by the breach thus made, some of them flourishing revolvers and others armed with axes. After entering, the same course of lawless violence was continued. They had a search warrant from a magistrate, but did not act under it in getting in. They did not present it at the door, nor give any notice of it, nor ask for admittance under it (nor at all, for that matter), before breaking in; whereas section 799 of the Code of Criminal Procedure (which only follows the common law) prescribes that an officer having a search warrant may break into the house to be searched only 'if, after notice of his authority and purpose, he be refused admittance;' and section 120 of the Penal Code makes it a criminal offence to exceed the authority which a search warrant confers by law. Their conduct in breaking in was just as lawless as though they had no warrant, because they did not act under the warrant."

The learned writer then proceeds:

"The 'raid,' as it is aptly called (for a lawless word best describes a lawless act), was, according to all accounts, planned and led by the District Attorney of New York County in person—the chief officer elected by the people to guard their rights and liberties, and maintain law and order in the community; but this seems quite incredible. The grand jury was in session, but no inquiry was made by it into the matter; nor did any one in the government of the city call the police to account, or make any protest; nor has any one made any complaint to the Governor of the State to enable him to exercise the constitutional power given to him for investigation, and for redress and relief to the People, in such cases."

In this statement, clearly, there are many errors and not a little unfairness. In the first place, it is said that the place invaded was alleged to be a place of *private* gaming. We are at some loss to know what the learned author may mean by that term. It was not public, to be sure, in the sense that any one might enter, for otherwise it would long since have been suppressed. But it was run by a public gambler for his own gain and for his own gain solely, and it was no more a place of private gaming than is any other gambling hell in the City of New York.

Secondly, since the Inspector had a warrant of arrest for a felon supposed to be upon the premises—a fact of which the learned author was in ignorance—it was, manifestly, but proper that he should take with him a posse of police and that he should surround the place to prevent escape.

Thirdly, the violence of the attack consisted, according to all accounts, in the striking of the door with a small sledge, the accidental breaking of a window by a ladder which was being raised for the purpose of seeking entrance through the window, and, perhaps, the unnecessary flourishing of a revolver by some overzealous officer.

Fourthly, no force was used at all until repeated efforts had been made to gain admittance to the house in the ordinary way.

Fifthly, as to the "course of lawless violence pursued after entering the house," it may suffice to say that, at the close of the proceeding, Mr. Canfield thanked the Inspector for the courtesy that had been displayed, and that in the criminal proceedings subsequently instituted, counsel for the complainant (Mr. Canfield's manager) expressly disclaimed any complaint based on that which occurred after the entrance had been effected.

It is obvious, therefore, that, as to this incident, the learned author has been seriously misinformed, and that the Inspector complied not only with the spirit but with the very letter of the law—unless it shall be contended that an officer, armed with criminal process to apprehend a felon, need stand in the middle of the street and read his warrant to the bare walls, when once he has made reasonable efforts to obtain admittance and when no one has come to the door in response to those efforts.

As to the second incident to which Judge Gaynor refers, he says:

"In a similar raid not long ago, a retainer or officer of the District Attorney's office shot down a man. He has not been tried for it nor even indicted, although no lawful cause or justification for his act is known to the public."

As to this, it may, perhaps, suffice to say that officers employed by the District Attorney, lawfully engaged in executing a warrant, were shot at by persons whom they were endeavoring to arrest for complicity in a felony. One of these officers returned the fire, and a man was wounded. The officer who did the shooting was arrested and has been held for the action of the grand jury. The District Attorney, believing, for obvious reasons, that he ought not to conduct the case, has asked the Attorney-General to undertake the prosecution. These facts have all been published widely in the newspapers, and the learned author was, therefore, grossly misinformed when he was told that no lawful cause or justification for the act was known to the public.

V.—OF CONSTITUTIONAL RIGHTS.

Clearly, therefore, the learned author is flagrantly at fault in his facts. Were he an ordinary citizen, this would be, perhaps, no very grave matter; but he is a Judge of our court of highest original jurisdiction, an officer of great power, a personage of immense influence for good or ill; at the very least, a distinguished member of the community; and, merely by reason of his influence and his distinction, it is a grave thing to any man that this judicial officer should write for publication in condemnation of his acts. But the thing has a still graver aspect. At the time when Judge Gaynor's paper appeared, there was pending in the magistrate's court a prosecution of Inspector Brooks, upon precisely the lines suggested in that paper, founded upon the sec-

tions of the law therein quoted, instituted, perhaps, after the interview between Judge Gaynor and that "truthful and careful person," Mr. Canfield's attorney—at all events, instigated and prosecuted by Mr. Canfield's manager, Mr. Bucklin, and conducted by his private attorneys.

Shortly after Judge Gaynor's article appeared, the magistrate before whom the hearing was pending held Inspector Brooks for trial.

Speaking of constitutional rights, it is, perhaps, not one of the least important safeguards of our system of government that no man shall be condemned unheard; nor is it one of the least honored or honorable of the traditions of our judiciary that a judicial officer shall not express in public an opinion as to matters pending before the courts, since his opinion may have weight in determining the matter thus pending, and since thus a man may be in a measure deprived of his liberty or of his property without his day in court, and in spirit at least be deprived of his liberty or his property without due process of law.

We venture to say, therefore, that this magazine article, issued over the signature of a judge of the Supreme Court and condemning unheard two men accused of serious crimes, constitutes a greater offence against the spirit of our institutions than a thousand unwarranted arrests by the police.

It has been with some hesitation that we have undertaken this reply to Judge Gaynor's paper, because we realized that the reply, if made, involved plain speaking with regard to one who held a judicial office. It involved, therefore, an attitude that might be construed as a lack of reverence for the bench. On reflection, however, we have concluded that the character of our bench is such, and the respect it has earned is so deep-rooted, that no public interests demand that a judicial officer shall be shielded from adverse criticism, based upon and merited by a non-judicial act.

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